No. 04-480

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *et al.*,

Petitioners,

v.

GROKSTER, LTD., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF INTERNET *AMICI*: CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION, UNITED STATES TELECOM ASSOCIATION, US INTERNET INDUSTRY ASSOCIATION, AT&T CORP., BELLSOUTH CORPORATION, MCI, INC., SAVVIS COMMUNICATIONS CORPORATION, SBC INTERNET SERVICES, INC., SUN MICROSYSTEMS, INC., AND VERIZON COMMUNICATIONS INC. IN SUPPORT OF AFFIRMANCE

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STATEMENT OF INTEREST[1]

Amici curiae are enterprises that, collectively, provide the digital transmission facilities, routers, modems, Internet connectivity, and content and services that constitute the Internet ("Internet *amici*"). Internet *amici* have invested and will invest tens of billions of dollars in the hardware and software that makes the Internet so valuable.

Many Internet *amici* create and distribute copyrighted works, including web pages, copyrighted software, cell phone "ring tones," and other protected material. None of the Internet *amici* condones copyright infringement and none endorses respondents' particular business model. On this point, Internet *amici* agree with petitioners that a business model consciously built to exploit past infringing activity (such as the capture of the Napster customer base), that subsists almost exclusively upon infringement, and that appears to involve a corporate decision at the highest levels both to promote infringement and to create "plausible deniability," *should* be subject to some form of legal sanction and redress.[2]

At the same time, Internet *amici* disagree with petitioners as to the scope and urgency of the problem at hand and the appropriate forum and means for its solution. Petitioners and their *amici* (including the United States) ask this Court to erase the clear line between the copyright monopoly, which attaches only to *forms of expression*, and the freedom and incentive to innovate in the technologies and services that are the *means for dissemination* of copyrighted content.

The bright-line rule adopted in *Sony Corp. v. Universal City*

1. Pursuant to Rule 37.3, the parties have consented to filing of this brief and their consent letters have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, Internet *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than Internet *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

2. Internet *amici* and their members are harmed by the unlawful duplication or dissemination of protected content. Many Internet Service Providers ("ISPs") have joint ventures or revenue-sharing relationships with lawful music and movie websites. Thus, Internet *amici* also suffer revenue losses when peer-to-peer software is misused to bypass these legitimate content sources and infringe copyrighted material.

Studios, 464 U.S. 417 (1984), has stood the test of time and allowed the United States to pioneer innovation in communications and Internet technologies. Internet *amici* have invested billions of dollars in reliance upon that bright-line rule. The surest way to depress capital investment in new Internet technologies, such as wireless data services, on-demand video, and "seamless mobility" – the transmission of content from television, to computer, to cell phone, to new devices yet to be created or marketed – is to modify *Sony* by adopting any of the malleable, multi-factored tests proffered by petitioners and their *amici*.

Copyright monopolies are granted for the benefit of the *consumer* – to "induce" the artist to create and release artistic, scientific, or informational works. *Sony*, 464 U.S. at 429 (citing *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)). Suppressing *distribution* technologies, while possibly beneficial to the artist in the short run in creating exclusive distribution chains and maximizing monopoly profits, is antithetical to the purpose of Copyright. The difference between these two related but distinct concepts – rewarding the artist versus benefiting the consumer – is seen in numerous laws that condemn or limit improper extension of the copyright monopoly into distribution. To achieve Copyright's purpose, both *creation* of works and *delivery* of the works must be promoted. The artist is entitled to the quiet of a limited statutory monopoly to reward creative effort, but should not be able to extend that monopoly to all present and future outlets for distribution. They are (and should be) subject to the "creative destruction" of a free-market economy, including improvements in distribution and technological innovation.

Only Congress has the constitutional mandate and institutional capacity to address peer-to-peer technology in a way that promotes the good and punishes the bad. Internet *amici* stand ready to work with copyright owners and the content community to arrive at a comprehensive legislative solution to this problem. Internet *amici* urge this Court, however, not to craft "federal common law" remedies that would take this critical issue away from the Political Branches

and create a litigation nightmare for legitimate innovators and service providers.[3]

INTRODUCTION & SUMMARY OF ARGUMENT

Like other modern tools that have vastly increased human understanding and the ability to communicate, the Internet is a "multiple-use" technology. While most people use the Internet for lawful (and constitutionally protected) expressive activity, there is a series of unlawful practices – such as spamming, spyware, identity theft, modem hijacking, and other online schemes and frauds – that injure Internet-related businesses and Internet users. Petitioners maintain, and Internet *amici* agree, that they have been victimized by one such practice: individuals' use of peer-to-peer file-sharing software for unlawful copying and distribution of copyrighted sound recordings and motion pictures.

This wanton disregard of intellectual property rights should be stopped. Internet *amici* have complied with lawfully issued subpoenas obtained by copyright owners in their campaign to identify more than 8,400 individuals alleged to have engaged in direct infringement through the misuse of peer-to-peer file-sharing software. That effort to punish and deter the direct infringers themselves is bearing fruit and requires no alteration of existing copyright law.[4]

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3. The current appeal concerns only a narrow, certified issue pertaining to respondents' current software. Respondents' alleged past bad conduct, intent, and means of building their businesses are still before the district court, and not before this Court. The district court retains jurisdiction to determine both monetary relief and the appropriate scope of forward-looking equitable relief if past wrongful conduct is shown.

4. Enforcement against direct infringers has generated thousands of monetary settlements and has increased public awareness of the unlawful nature of distributing protected works and decreased the volume of infringement. *See, e.g., 2004 Transcript of Q&A with RIAA President Cary Sherman*, The Daily Texan, Mar. 25, 2004, http://www.dailytexanonline.com/news/2004/03/25/Focus/Transcript.Of.Qa.With.Riaa.President.Cary.Sherman-641217.shtml (RIAA President explaining "[w]e've seen a marked decline in illegal file-sharing, a marked increase in business at the legitimate online music services, and a spike in CD sales as well"). Both CD sales and lawful online sales of music have increased in the wake of this litigation and public education effort against direct infringers. *See, e.g.*, Sean Daly, *10 Million iPods, Previewing the CD's End*, Wash. Post, Feb. 13, 2005, at A01.

Unfortunately, petitioners seek to use this case to radically expand the limited statutory monopoly. Their immediate target is peer-to-peer technology, but their positions threaten all multiple-use technologies and services. Petitioners could (and did) ask Congress to expand the Copyright Act to prohibit the offering of specific peer-to-peer software. But dissatisfied with the legislative process they initiated, they now are asking this Court to create a new "federal common law" of secondary liability for *all* technology and service providers. Hoping to bypass the negotiation and accommodation of competing interests that is part of any legislative change, petitioners and their *amici* have filed a raft of Brandeis briefs, literally begging this Court to pretermit the normal legislative process.

Petitioners proffer various formulations of a broad new "federal common law" rule that would encompass not only peer-to-peer abusers, but also a myriad of legitimate Internet businesses and technologies. Internet *amici* and the technologies that they are developing provide the possibility of vast new international markets where domestic copyright owners' products can be profitably disseminated. With no principle that would capture only those parties who most agree should be condemned, petitioners' submissions translate into two vastly overbroad rules of secondary copyright liability.

First: An entity would be presumptively liable for contributory infringement if (a) it "know[s] full well" that some illegal activity is taking place using its technology and (b) the technology "make[s] possible the infringement that could not otherwise occur." Motion Picture Studio & Recording Co. Pet'rs ("MPRC") Br. 17-18; see id. at 25-26. But every Internet-related company could be made aware that infringement occurs via its service, and almost any computer system component may "make possible" infringement in the sweeping sense that petitioners use that phrase. Therefore, the content providers' new theory of liability is almost limitless and would force Internet amici to seek to control the content of every Internet user's private communications.

Second: Any business is vicariously liable if (a) it derives some monetary value (even indirectly through advertising revenue) from use of its service or technology for infringement, and (b) the firm could re-engineer its product or service better to

supervise and control customers' activities. *Id.* at 19-20, 43-44, 46-47. This theory treats Internet users like employees, with Internet amici required to monitor, supervise, and control tens of millions of subscribers. Neither "test" finds any logical or doctrinal roots in the Copyright Act, in Sony, or elsewhere. Moreover, such rules cannot be applied to ISPs, as they conflict with Congress's clear intent, expressed in numerous statutory protections, to prevent the imposition of "Big Brother" duties on Internet amici.

The judicial expansion of secondary copyright liability advocated by petitioners is precisely the wrong approach. It is simply impossible for this Court to craft a rule that will target only a particular business model connected with a specific technology without the threat that the new doctrine will be used by copyright owners—reputable or otherwise—to impose judicially created duties on legitimate businesses and technologies. The result will be a new form of copyright "strike suit" that will reduce innovation and investment in the Internet and, perversely, hamper the most robust forum for the dissemination of copyrighted works.

Only Congress has the institutional capacity to find facts, weigh countervailing economic interests, and arrive at an acceptable approach that will protect copyright owners, while also avoiding excessive restrictions on technological development. Congress works with a scalpel; the common law is a blunderbuss. Only a statute can precisely define liability in such a way as to target only truly culpable offenders; create exemptions or safe harbors protecting those parties (such as libraries) or technologies (such as broadband) least threatening or most in need of deployment incentives; and carefully tailor remedies to be precise and effective.

In fact, late in the 108th Congress, Members of Congress and interested parties almost reached an accord on this problem, and that compromise is *nothing like the broad and unbridled new doctrines that petitioners demand from this Court.* Moreover, the only pronouncements Congress has made in this area point in exactly the opposite direction, *e.g.*, protection of the Internet and Internet *amici* from ill-defined policing duties or liability for the personal communications of individual Internet users. This Court should decline

petitioners' invitation to create a broad common law rule that expands secondary copyright liability and instead defer to Congress to arrive at a legislative solution—as it has done so many times before—to harmonize the Copyright Act with technological change.

ARGUMENT

Petitioners' occasional nod to the text of the Copyright Act and use of carefully isolated snippets from this Court's prior decisions cannot camouflage the fact that petitioners' enterprise is a radical one. What they are seeking is an unprecedented *judicial* expansion of the reach of the copyright monopoly. Petitioners' proposed rewrite of the Copyright Act and this Court's decision in *Sony* would render every multiple-use technology manufacturer or service provider presumptively liable for infringement by others.

I. Petitioners' New Multi-Factor "Common Law" Tests Would Eviscerate *Sony*'s Bright-Line Rule.

At the heart of *Sony* lies the Court's recognition that innovative companies should not be forced to abandon development of multi-use technologies that also can be used to commit individual acts of copyright infringement. To avoid that risk and to limit the bounds of the copyright monopoly to the "grants authorized by Congress," 464 U.S. at 421, the Court crafted a bright-line rule that would prevent copyright owners from holding hostage any new technology with a potential for infringement. That rule, which has promoted American success in the high-tech sector for the last two decades, is this: *A technology provider is not liable for secondary copyright infringement if its technology is capable of substantial non-infringing use.* 464 U.S. at 442.

This rule has properly confined the copyright monopoly to the parameters of the limited privilege authorized by Congress. It has also ensured that technology innovators and, indeed, creators of any consumer electronics product that is "merely capable" of any "substantial non-infringing use," can develop and market their products without facing a "veto power" from copyright owners. The *Sony* defense, as applied to information distribution technologies, directly furthers the purpose of Copyright—not only to foster the creation of new

works—but to allow for their broad dissemination to an ever wider national and international audience. Suppression of new distribution technologies will inevitably reduce both incentives to create (by limiting output) and reduce the public enjoyment of copyrighted works (by raising prices and reducing market penetration of expressive works).

Petitioners acknowledge no limits as to who may be conscripted to help them enforce the copyright monopoly. But extreme enforcement efforts that threaten to constrict the very distribution channels through which copyrighted works are disseminated disserve the consumer interest as surely as does failure to create content in the first place. It is for this reason that the courts and Congress alike have time and again limited or condemned the improper extension of the copyright monopoly into the means and technology of distribution. For example, record companies may not fix prices of music CDs[5]; songwriters may not tie all songs into unregulated blanket licenses[6]; cable operators may not discriminate against rivals by denying them access to satellite-delivered programming they or their affiliates create, 47 U.S.C. § 548; and television program owners may be compelled to sell their programs to cable operators for statutory license fees, 17 U.S.C. § 111. Maximizing the monopoly profits of content creators has never justified restraints on content delivery.

Petitioners' four proposed alterations of *Sony*'s bright-line rule, if adopted, would create uncertainty and chill the technological advancement that *Sony* sought to protect. A small group of copyright owners would hold sway over our entire digital economy, including the high-tech means of distributing copyrighted works to the public.

1. According to petitioners, the substantial noninfringing use test in *Sony* should not apply if the "defendant engages in

5. *E.g.*, FTC Press Release, *Record Companies Settle FTC Charges of Restraining Competition in CD Music Market*, May 10, 2000, *at* http://www.ftc.gov/opa/2000/05/cdpres.htm; David Lieberman, *States Settle CD Price-Fixing Case*, USA Today, Sept. 30, 2002, http://www.usatoday.com/life/music/news/2002-09-30-cd-settlement_x.htm.

6. *E.g.*, *United States v. Am. Soc'y of Composers, Authors & Publishers* ("*ASCAP*"), No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

conduct that encourages or assists infringement." MPRC Br. 18. That exception would eviscerate the *Sony* defense altogether because the conduct petitioners describe as evidence "of encouraging and assisting infringement" is no different from the neutral act of selling the multi-use technology that was before the *Sony* Court. 464 U.S. at 440.

For example, petitioners find evidence of infringement in the fact that respondents' technology is "tailor-made for media files" and their technology offers users anonymity. MPRC Br. 25. Petitioners also see respondents' efforts to "maintain and upgrade their networks" as evidence of infringement. *Id.* at 26. But Sony's Betamax was no less "guilty" of being tailor-made for recording video images and was no less anonymous. Nor did the Court suggest that Sony could not provide service or technological upgrades to customers without risking secondary liability. Indeed, in the digital age, it is difficult to contemplate a competitive (multi-use) technology that lacks the promise of service and upgrades; orphan hardware or software is well nigh valueless.

2. Petitioners' next exception permits a copyright owner to prevail merely by showing that the *current, principal* use of a multi-use technology is infringing. *Id.* at 18-19, 30-38. That exception would stop innovation in its tracks regardless of the potential benefits of a new product. The fact is, teenagers and young adults have often been the first adopters of picture phones, digital music players, online games, and so forth, and their circumstances (no cash) and attitudes (no respect for "old-people" rules) often determine how a new technology is first employed. But technologies prone to mischief in their youth often grow up to contribute substantially to our economy. In the 1960s, over-the-air broadcasters vehemently attacked cable operators for "pirating" their broadcast signals. The Court's decision in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), allowed the cable operators to expand and mature to the point that those same broadcasters were eventually demanding the right to force cable operators to carry their content over the same technology broadcasters had tried to demonize scant decades before.

Sony wisely rejected applying a premature brake on new

innovations in content distribution technology, ruling that multi-use technology is lawful as long as it is "merely ... *capable* of substantial noninfringing uses." 464 U.S. at 442 (emphasis added). Were the rule otherwise, the acts of direct infringers would enable copyright owners to veto neutrally designed technologies that offer substantial noninfringing uses to consumers. *Id.* at 441 n.21. As this Court recognized, "it seems extraordinary" to give a veto to copyright owners over new technologies "simply because they may be used to infringe copyrights." *Id.* That observation is as true today as it was in 1984.

3. Petitioners' next limitation would render the *Sony* defense inapplicable whenever a technology provider can develop and implement some means of separating infringing from noninfringing uses. *E.g.*, MPRC Br. 32-34. But *Sony* rejected this same argument when copyright owners argued vehemently that Sony should have been required to implement filtering or blocking devices. This Court declined to consider alternative versions of technology eschewed by Sony in considering whether the *Sony* defense was applicable. 464 U.S. at 422-23, 442-55. This decision reflected the sound understanding that courts should not be in the business of second-guessing the particular engineering solution chosen by the technology provider. Any such second-guessing, necessarily based on 20/20 hindsight regarding the predominant use of the technology and subsequent advances in filtering devices, would chill innovation. Even the United States agrees that "[p]roduct manufacturers do not have an independent legal duty under copyright law to modify their products so as to control their customers' infringing conduct." U.S. Br. 19 & n.3, 30 n.6.

4. Petitioners argue that the *Sony* defense does not apply to vicarious liability. MPRC Br. 48. But this limitation on *Sony* would render the defense largely meaningless. Under petitioners' reasoning, any multi-use technology provider who derives any financial benefit from any infringing use of its technology (even if it would derive this benefit irrespective of the use or misuse by individual consumers) and who, with a certain investment of time and money, could devise a

way (however crude or imperfect) to separate infringing from noninfringing use, is liable for vicarious infringement. Under this theory, few technology providers could escape liability because, with the right investment of time and money (and no concern for consumer privacy and First Amendment freedoms), some crude filtering device almost always could be jury-rigged. This Court could not have intended *Sony* to provide a bright-line defense to contributory infringement only to have the same technology providers subjected to debilitating liability under a closely related theory.[7]

5. Finally, several *amici* attempt to roll these four ill-advised new exceptions to *Sony*, along with a grab bag of other "factors," into a "totality of the circumstances" test. This is essentially the test created by Judge Posner's opinion in *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003). Such a test would require the federal district courts to determine, on a case-by-case basis, whether a variety of factors, including the current break-down of companies' revenues, the current predominant use of the multi-use technology, and the cost of filtering alternatives, counsels in favor of imposing liability. That approach is little better than giving the courts no direction at all, since *amici* do not identify any necessary and sufficient criteria for liability; do not posit any ordinal relationship among these factors; and do not even say whether the various factors they do identify are exclusive. The *Aimster* approach is judicial legislation at its worst. It does not merely blur *Sony*'s bright-line protection; it erases it altogether.

II. Fearing Innovation, Copyright Owners Have a Long and Unsuccessful History of Trying To Use the Courts To Halt New Technologies, Including Distribution Technologies.

This case is the latest in a long string of instances in which copyright owners, frightened by a new technological development, use the same set of tired arguments and overblown rhetoric to defend comfortable delivery systems by asking the federal courts to curtail access to the

7. It is no surprise, then, that even several *amici* supporting petitioners or vacatur acknowledge that the *Sony* defense applies to vicarious liability. *E.g.*, Business Software Alliance Br. 8 n.6; American Intellectual Property Law Ass'n Br. 7 n.3.

development of new content distribution technology. These unsuccessful attempts to restrict new technologies date back to the invention of the mechanical player piano, nearly 100 years ago, *see White-Smith Music Publ'g v. Apollo Co.*, 209 U.S. 1 (1908). The briefs of petitioners and their *amici* in this case echo all of these prior, unsuccessful arguments.

1. Copyright owners always employ ominous rhetoric (more suited to a mystery novel than a legal brief) to describe the supposed threat created by advances in distribution technology. In hindsight, the concerns expressed by copyright owners about such threats have frequently proven overblown or unfounded.

For example, after the Ninth Circuit found that the makers of Sony Betamax VCRs were liable for contributory infringement, but prior to this Court's reversal of that decision, Congress considered a number of bills to correct the enormous technological and commercial roadblock created by the lower court's decision. In hearings on those bills, Jack Valenti, the president of the Motion Picture Association of America ("MPAA"), warned a subcommittee of the House Judiciary Committee that unless licensing fees were imposed on the VCR, the "VCR avalanche" would "strip[] . . . clean [the post-theatrical market for movies] of . . . profit potential," and that those markets would be "decimated, shrunken [and] collapsed" by widespread use of the VCR.[8] The VCR, according to Mr. Valenti, was "to the American film producer and the American public as the Boston strangler is to the woman home alone."[9] The same dire predictions appeared in the content providers' briefs to this Court in *Sony* itself. *See, e.g.*, Br. of *Sony* Respondents (Oct. 1982) ("Respondents simply seek protection against the permanent loss of control over their property and the concomitant erosion of their copyrights that will necessarily result as millions of VTRs are

8. *Home Recording of Copyrighted Works, Hearings on H.R. 4783 et al. before Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on Judiciary*, 97th Cong. 4, 8 (1982) (testimony of Jack Valenti, President, MPAA) ("HRCW").

9. *Id.*

sold and hundreds of millions of unauthorized VTR copies of respondents' works are made.").[10]

After this Court refused to expand the copyright monopoly in *Sony*, 464 U.S. at 456, the motion picture industry readily adapted to the VCR. Far from destroying the post-theatrical market for movies and ruining the industry, the VCR (and successor technologies) has vastly increased the profitability of films, and has allowed studios to produce movies that could not have survived on theater revenues alone.[11] Contrary to Mr. Valenti's dire predictions, the VCR and related technologies turned out to be "the greatest friend that the American film producer ever had." HRCW 8. With the benefit of hindsight, it is now clear that had the Ninth Circuit's decision been affirmed, the harm to the public and to the motion picture industry itself would have been irreparable.

2. Nor is this the first time that copyright owners have argued that innovators have an affirmative duty to alter their technology in ways dictated by the copyright industry, just as

10. *See also* Br. of *Sony* Respondents ("[I]f petitioners are permitted to continue their activities without compensating respondents," such activities will "prejudic[e] the entire television viewing public, VTR and non-VTR owners alike."); MPAA *Sony* Br. (Oct. 1982) ("[D]ue to VTRs, the works of [MPAA's] members have become 'so easy of replication' that incentive to produce would be depressed 'by the prospect of rampant reproduction by free-loaders.'" (citation omitted)).

11. "By the 1990s, a film's income from videotapes dwarfed all other revenue streams." Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 823 (2004) (citations omitted); *see* Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 347 (2004) (noting that VCRs became one of the most lucrative inventions for movie producers since the movie projector). Time Warner's senior intellectual property counsel noted:

> [T]he film industry got together and brought the famous, or infamous, Betamax case thinking that these VCRs were going to destroy the economic basis of film distribution, particularly theatrical exhibition and profitable television distribution. What actually happened was just the opposite. . . . This has become one of the most profitable channels of distribution for the film industry."

Conference: *Digital Technology and Copyright: A Threat or a Promise?*, 39 IDEA 291, 305 (1999) (remarks of Dean Marks).

they contend here. *E.g.*, MPRC Br. 47, 48. The Recording Industry Association of America, Inc. ("RIAA") sought to enjoin distribution of the Diamond Rio, one of the first portable digital music or MP3 players, a type of device of which Apple's iPod is perhaps the best known.[12] The argument made by RIAA in the Diamond Rio case, that innovators have a specific duty to alter their technology to meet the demands of the recording industry, is the same as the claim made by petitioners in this case. *Id.* at 47-48 ("[R]espondents have also refused to implement other readily available mechanisms that would prevent the transfer of works that infringe petitioners copyrights.").

Indeed, RIAA's statements in the Diamond Rio case—criticizing the inventors for their effrontery in failing to include RIAA in the design of the underlying product, and their unwillingness to alter their business plan to accommodate RIAA—lay bare the veto RIAA expects to wield over the development and marketing of any potential multi-use technology. "To our disappointment, Diamond declined to postpone its product launch so that we could constructively address the issues, leaving us with no other option but to take legal action to prevent distribution of these devices." RIAA Press Release, *RIAA Takes Stand to Protect Legitimate Online Marketplace*, Oct. 9, 1998, *at* http://www.riaa.com/news/newsletter/press1998/100998.asp.

Using similar logic, RIAA asked the Federal Communications Commission ("FCC") to impose expansive constraints on Digital Audio Broadcasting ("DAB"), which uses digital technologies to enable or to provide better sound quality over traditional AM and FM radio frequencies.[13] The motion picture industry also has demanded changes to the Digital Video Recorder ("DVR"), made popular under the TiVo and ReplayTV brand-names, claiming that this technology infringes its

12. *RIAA v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1073 (9th Cir. 1999). There, the Ninth Circuit rejected the RIAA's attempt to classify the novel device as a digital audio recording device and to expand the reach of the Audio Home Recording Act. *Id.* at 1081.

13. Comments of RIAA, *Digital Audio Broad. Sys. & Their Impact on the Terrestrial Radio Broad. Serv.*, FCC MM Dkt. No. 99-325 at iv-v (June 16, 2004).

copyrights even though it performs the same functions as the VCR (but is easier to program than a VCR and allows users more easily to fast-forward through commercials).[14] The plaintiffs urged the court to find ReplayTV liable for copyright infringement in part because the defendants made "a deliberate decision to offer their users features that are specifically designed to enable widespread infringements, when they have the ability to control or greatly limit that conduct by declining to offer or to facilitate or support use of those unlawful features." Paramount Compl. ¶ 85. Similarly, the motion picture industry opposed certification of TiVo's Broadcast Flag solution at the FCC, which (ironically) is an FCC effort to certify specific methods of blocking redistribution of digital television programs using peer-to-peer software.[15]

3. The recording and motion picture industries invoke the same dire themes and make the same legal arguments in this case. *See, e.g.*, MPRC Br. 43 ("[R]espondents make their money from advertising to users each time they access the services to copy and distribute copyrighted works. The larger the number of users attracted by the infringing content, the more money Grokster and Streamcast make."). Copyright owners have leveled these same amorphous and overbroad accusations against broadband networks, personal computers, and even peripheral capabilities such as Internet search engines and credit card companies.

RIAA singled out broadband before Congress, claiming that "Verizon and SBC have little or no economic incentive to combat piracy . . . [because] music downloading is driving the

14. *See, e.g.*, Am. Compl., *Paramount Pictures Corp. v. ReplayTV, Inc.*, 298 F. Supp. 2d 921 (C.D. Cal. 2004) ("Paramount Compl.").

15. *Digital Output Protection Technology and Recording Method Certifications*, 19 F.C.C.R. 15,876, 15,876 (¶ 1) (2004). TiVo developed a technology that the FCC found met the goals of preventing the mass indiscriminate redistribution of content, *id.* at 15,925 (¶ 108), but the MPAA urged the FCC to reject this solution both in an initial opposition and on reconsideration because it permitted the user to access the recorded programs remotely and did not tie the user to his or her living room. Opp'n of the MPAA, *Digital Output Protection Technology and Recording Method Certifications*, FCC MB Dkt. No. 04-63 (Apr. 4, 2004); Pet'n for Partial Recon., *Digital Output Protection Technology and Recording Method Certifications*, FCC MB Dkt. No. 04-63 (Sept. 13, 2004).

[DSL] business."[16] The recording industry has repeatedly argued that copyright law reaches mere Internet conduits like Verizon and SBC, and that were it not for the specific "safe harbors" created by the Digital Millennium Copyright Act ("DMCA"), these "ISPs could face enormous monetary liability for the actions of their subscribers. With the current levels of piracy, that could translate into enormous monetary liability."[17] Echoing his concerns of 20 years before about the VCR, Jack Valenti said in Senate testimony that the lack of broadband access was a "moat" that has "slowed a widespread assault" on movies.[18]

The stratagem of attacking new distribution technologies and channels of distribution, once given legal sanction and set loose upon society, would apply to products as well as services. Thus, copyright owners have complained about personal computers. In March 2002, during a hearing before the Senate Commerce Committee, Michael Eisner, CEO of Disney, accused computer manufacturers generally, and Apple specifically, of promoting copyright piracy. Brooks Boliek, *Mouse Grouse: Dis Boss Lays into Computer Biz*, THE HOLLYWOOD REPORTER, Mar. 1, 2002, *at* http://www.larta.org/pl/NewsArticles/02Marc01_HR_Eisner.htm (Mr. Eisner charging that "[t]he killer app for the computer industry is piracy," and "[t]hey think their short-term growth is predicated on pirated content"; accusing Apple of "telling people 'that they can create a theft if they buy this computer'").

As noted above, there is no doubt that copyright owners have legitimate grievances against some peer-to-peer software distributors. Internet *amici* support targeted legislation that outlaws certain specific products offered in carefully defined ways as opposed to attacking (or allowing debilitating litigation attacks) on multi-use technology in general.

16. *Consumer Privacy and Gov't Tech. Mandates in the Digital Media Marketplace, Hr'g Before the Sen. Commerce Comm.* (Sept. 17, 2003) (testimony of Cary Sherman, President and Counsel, RIAA), http://commerce.senate.gov/hearings/testimony.cfm?id=919&wit_id=2584.

17. *Id.*

18. *See* MPAA Press Release, *Valenti Testifies Piracy Threatens To Destroy Movie Industry and U.S. Economy*, Feb. 12, 2000, *at* http://www.mpaa.org/jack/2002/2002_02_12a.htm.

Unfortunately, copyright owners—not all of which are as responsible as the plaintiffs in this litigation—cannot resist the temptation to overreach. For example, Perfect 10, a copyright owner of pornographic materials, has brought an infringement suit against Google, one of the most popular Internet search engines, asserting that Google's business is based on the "draw" of illicit content.[19]

Perfect 10 argued that Google derives a "direct financial benefit" from the alleged infringement by charging fees to allegedly infringing websites and from the increase in traffic to Google's website from the "draw" of these allegedly infringing sites. Google Compl. ¶ 56. Perfect 10's theory, that Google should affirmatively alter its practices to distinguish between copyrighted and non-copyrighted works in its search function, mirrors petitioners' argument here that technology companies must give copyright owners a co-equal role in the innovation process and must satisfy any concerns raised by any copyright holder in order to avoid suit. Perfect 10 has gone so far as to argue that infringement liability should extend to Visa and MasterCard, because those companies allegedly derive a benefit from infringing conduct.[20]

In sum, petitioners and other copyright owners routinely target any innovation that alters the status quo and claim that it will result in the Götterdämmerung of Copyright. While petitioners focus on the alleged bad acts of respondents, the history of the copyright owners' prior conduct shows that their arguments have no theoretical or practical limit and no sense of balancing future innovation (and new and valuable distribution technologies and channels) against today's monopoly profits. If the Court expands copyright liability in the unprecedented manner called for by petitioners, there can be no doubt that they will continue to use these same arguments against any technology that they claim benefits from infringement in any way, which, in this digital world, is nearly any technology at all.

19. Compl., *Perfect 10, Inc. v. Google, Inc.*, No. 2:04-cv-09484 (C.D. Cal. filed Nov. 19, 2004) ("Google Compl.").

20. *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, et al.*, No. C-04-0371, 2004 WL 1773349 (N.D. Cal. Aug. 5).

III. Recent Multi-Industry Negotiations over Legislative Solutions Exemplify the Constitutionally Mandated Process for any Expansion of Petitioners' Copyrights.

Congress opened debate on abuses of peer-to-peer file-sharing technology (including copyright infringement) almost three years ago.[21] Since then, Members have introduced numerous bills designed to address such problems.[22] Specifically, in June 2004 six Senators introduced a bill designed to address the type of abuse in which respondents are alleged to have engaged—the use of peer-to-peer technology to induce others to engage in copyright infringement. The history of this bill, the Inducing Infringement of Copyrights Act of 2004 ("Induce Act"), S. 2560 (2004), and the multi-party negotiations-based approach that almost produced a "consensus" draft, demonstrate the correct process for solving this problem. Notably, the solution toward which the legislative process was converging in no way resembles the new judicially-created common law rule that petitioners demand here.

1. On June 22, 2004, Senators Hatch, Leahy, Frist, Daschle, Graham, and Boxer introduced the Induce Act to codify an expanded notion of secondary copyright liability that would reach the type of peer-to-peer firms that intentionally induce others to engage in massive copyright infringement.[23] In his introductory remarks, Senator Hatch described the bad acts or business models that he sought to ban as the theft and widespread distribution of copyrighted material through the

21. *Privacy of Intellectual Property on Peer-to-Peer Networks: Hr'g before Subcomm. on Courts, the Internet and Intellectual Property of House Comm. on the Judiciary*, 107th Cong. 21 (Sept. 26, 2002).

22. *See, e.g.*, Family Entm't and Copyright Act of 2005, S. 167, 109th Cong. (2005); Artists' Rights and Theft Prevention (ART) Act, S. 1932, 108th Cong. (2004); Piracy Deterrence and Educ. Act of 2004, H.R. 4077, 108th Cong. (2004); Protecting Children from Peer-to-Peer Pornography Act, H.R. 2885, 108th Cong. (2003); Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. (2002).

23. *See* 150 CONG. REC. S7189-S7192 (daily ed. June 22, 2004); *id.* at S7192 (describing the bill as importing a codified form of liability in patent law into statutory copyright law); *id.* at S7192 (statement of Sen. Leahy) (same).

use of third-party shields.[24] Throughout his remarks, Senator Hatch made clear that the proposed legislation targeted a narrow group of "bad actors" and constituted a change in the existing law of secondary liability in order to reach them.[25]

Senator Hatch and his colleagues quickly realized that targeting "bad actors," without doing damage to Internet *amici* and our digital economy, was not an easy task. Any legislative solution had to "address[] this serious threat to children and copyrights *without unduly burdening companies that engage in lawful commerce in the wide range of devices and programs that can copy digital files.*"[26] As co-sponsor Senator Leahy explained, it was critical that the bill reach only bad actors and not "target

24. The evil he sought to remedy was

> the intentional inducement of global distribution of billions of infringing copies of works at the prodding and instigation of sophisticated corporations that appear to want to profit from piracy, know better than to break the law themselves, and try to shield themselves from secondary liability by inducing others to infringe and then disclaiming control over those individuals.

Id.; *see id.* at S7193 (statement of Sen. Frist) (explaining the bill was designed to "target[] the bad actors who are encouraging others to steal").

25. *See, e.g., id.* at S7189, S7190, S7191, S7192; *see also Protecting Innovation and Art while Preventing Piracy, Hearing before the Sen. Comm. on Judiciary* (July 22, 2004) ("*Induce Act Hr'g*"), *at* http://judiciary.senate.gov/hearing.cfm?id=1276 (statement of Sen. Hatch) ("[I]t is our intent that S. 2560 change the law of contributory liability only for a very narrow class of defendants.").

26. *Id.* at S7192 (emphasis added); *see id.* at S7190 ("[A]ll agree that non-piracy-adapted implementations of P2P could have legitimate and beneficial uses."); *see also id.* at S7192 (statement of Sen. Leahy) (identifying the goal "to bring affordable and reliable Internet access to every household"); *Induce Act Hr'g* (statement of Sen. Leahy) ("Senator Hatch and I have worked to promote the great possibilities of the Internet and the technologies that capitalize on its potential."). These sentiments are consistent with Senator Hatch's own observations as early as 1999 that "[h]igh technology is the single largest industry in the United States" and "is the key to the development of our future economy." Orrin Hatch, *Antitrust in the Digital Age*, Address before The Progress & Freedom Foundation, Feb. 1998, at 3 (stressing importance of protecting "technological paradigm shifts" like that being wrought by the Internet), http://www.pff.org/issues-pubs/futureinsights/fi5.1antitrust digitalage.html.

technology" or "demonize certain software."[27] As co-sponsor and Senate Majority Leader Frist emphasized, "[t]his bill should not . . . threaten in any manner the further advancement of technology."[28]

The Senators co-sponsoring this bill understood that the only way to achieve their twin goals of protecting copyrights in the digital environment while also protecting new digital technologies was to "build[] that consensus that is the hallmark of successful and useful legislation,"[29] especially in copyright law.[30] Accordingly, Senator Hatch explained that the Committee was "willing to enter into a constructive dialogue to ensure that the language is drawn as tightly as possible."[31]

2. Despite the co-sponsors' intentions narrowly to target certain actors, most of the experts who testified before the Senate Judiciary Committee agreed that the original draft fell short in two ways: It threatened many legitimate companies and technology developers with liability, and it failed necessarily to capture the specific bad practices and bad actors at which it was aimed.[32] As one participant explained, S. 2560

27. 150 Cong. Rec. S7192; *Induce Act Hr'g* (Sen. Leahy) (agreeing that "technology is not to blame, we need to target those who have hijacked technology and undermined the rights of copyright holders").

28. 150 Cong. Rec. S7193; *Induce Act Hr'g* (Sen. Leahy) ("This bill will protect our copyright holders *and spur innovation*." (emphasis added)).

29. *Id.* (Sen. Leahy); *see id.* (statement of Sen. Hatch) ("We want to continue to work with interested parties [including 'leading technology companies'] to make refinements that will help us achieve the bill's intent.").

30. Multi-industry negotiation is the paradigm of amendment to the Copyright Act. "Congress continues to rely on private interests to work out the text of bills," particularly copyright bills, because "[t]he negotiation process delegates everything to people who are, after all, the real copyright experts, and allows Congress to exploit their accumulated expertise. The participants are people who will have to order their day-to-day business relations with one another around the provisions of the legislation." Jessica Litman, Digital Copyright 61 (2001).

31. *Induce Act Hr'g* (statement of Sen. Hatch).

32. *See, e.g., id.* (statement of Gary J. Shapiro, President and CEO, Consumer Electronics Ass'n and Chairman, Home Recording Rights Coalition) ("In our view, S. 2560 is the most fundamental threat that consumers and technology industries have faced since the Ninth Circuit's decision in 1981," which was overturned in *Sony*.).

threatened to gut the defenses of *Sony* and included an intent standard that was "hopelessly [s]ubjective" such that it "[w]ould [t]hreaten [i]nnovation" and "verge[d] perilously on punishing speech."[33] Still another participant warned that numerous key areas needed revision, "including an express preservation of the defenses outlined in *Sony*," a clear statement that "mere knowledge" does not demonstrate intent to induce copyright infringement, a carving out of conduct such as "advertising or providing support to users" from consideration in finding liability, and a mechanism effectively to deter "weak, harassing or frivolous law suits."[34]

In order to reach a consensus on a targeted legislative solution, the Senate co-sponsors directed the Register of Copyrights to work with the interested parties "to achieve consensus proposals." Letter from Co-Sponsors of Induce Act to Marybeth Peters, Register of Copyrights, Aug. 13, 2004, http://leahy.senate.gov/press/200408/081704.html. The co-sponsors explained, "[w]e are open to any constructive input on how Congress can best frame a technology-neutral law directed at a small set of bad actors while protecting our legitimate technology industries from frivolous litigation." *Id.*

3. In September 2004, the Copyright Office forwarded its recommended text to the Committee,[35] but that draft also was unsuccessful. Even with the input of dozens of leading technology companies, technology and copyright owner trade organizations, individuals, consumer groups, and copyright owners who welcome free distribution of their works, the Copyright Office's proposed draft fared no better than did the original version of S. 2560. Its proposal cast the liability net too broadly, potentially sweeping within its ambit legitimate Internet-related businesses and technologies. As a coalition of 42 technology industry leaders, trade groups, education and library associations, service providers,

33. *Id.* (Mr. Shapiro); *see also id.* (Mr. Greenberg) (explaining that the "[p]ractical [u]ncertainty over [the] scope and [a]pplication of the [n]ew standard will [c]hill innovation").

34. *Id.* (statement of Robert Holleyman).

35. Recommendation and Explanatory Mem., *at* http://www.+copyright.gov/docs/S2560.pdf (visited Feb. 10, 2005).

equipment manufacturers, and consumer groups explained to the Committee, the Copyright Office's "draft raise[d] a host of new issues and would [have] create[d] an unprecedented new form of liability of uncertain, but potentially unlimited, reach."[36]

4. With the failure of the Copyright Office's draft to garner anything approaching a consensus, the co-sponsors turned to the industries themselves to negotiate a draft that would achieve the necessary balance between copyright protection and the legitimate concerns of the high-tech community. This multi-industry group met in a series of off-the-record meetings with Committee staff and attempted to shape a consensus bill.[37]

Although these discussions occurred behind closed doors, enough of their substance is contained in the public record to demonstrate that the tentative drafts created in this process were substantially more narrowly tailored than the original bill as introduced. They included more precise language and express savings clauses that simply could not be mirrored in any broad common law rule. They were in fact light years away from the new tests advocated by petitioners (and the United States) in this case.[38] Specifically, the discussions

36. Letter from Ass'n of Am. Univ. *et al.* to Senators Hatch and Leahy, Sept. 17, 2004, *at* http://www.publicknowledge.org/news/-letters/inducegroup; *see, e.g., Copyright Office Draft of INDUCE Fails To Inspire Industry Insiders*, COMM. DAILY, Sept. 7, 2004 (describing the objections of the Consumer Electronics Association, NetCoalition, and Verizon to the Copyright Office's draft that it was too broad and too subjective).

37. *See, e.g., Hatch Puts Off Induce Act for One Week*, COMM. DAILY, Oct. 1, 2004 (describing a meeting between Judiciary Committee staff and "representatives of telecom, high tech, consumer and content interests"); Ted Bridis, *Senate Talks Fail on File-Sharing Software*, MSNBC NEWS, Oct. 7, 2004, *at* http://msnbc.msn.com/id/6200562/ ("Sensing an impasse after weeks of acrimonious debate, Hatch invited lawyers and lobbyists representing the sides to propose their own compromise in the waning days of this congressional session.").

38. *See, e.g.*, Copyright Owners' Tentative Proposal (Oct. 5, 2004), *at* http://www.corante.com/importance/archives/induce_copyright_owner_tentative_proposal_10-5-04.pdf ("Oct. 5 Draft"). "Copyright industry executives defended the process, however, saying the criticism obscured the progress that is being made. 'What we're really quibbling

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included, among others, the following limitations, safeguards, and exemptions designed to weed out bad actors without ensnaring legitimate businesses or threatening them with crippling litigation:

(i) Expansion of liability only to a defined subset of "covered peer-to-peer product[s]," a term that expressly excluded ISPs. Liability would have been premised on two fundamental requirements: the defendant must "manufacture[], offer[] to the public, or provide[] a covered peer-to-peer product" *and* the defendant must have engaged in "covered viral infringement," *see, e.g.*, Oct. 5 Draft (g)(1). Both key statutory terms were carefully defined with the intention of reaching only the type of conduct that created a certain level of risk to copyright owners and not all multi-use distribution and reproduction technology, *see id.* (g)(2).[39]

(ii) Further limitations on the business models subject to liability to those for whom "the majority of the revenues, including revenues from advertising, of a covered peer-to-peer product result[ed] from covered viral infringement," *see, e.g., id.* (g)(1)(A) & (B), where "the availability of copies or phonorecords resulting from covered viral infringement is the principal reason the majority of users are attracted to the covered peer-to-peer product," *id.* (g)(1)(B).

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over here is how to define P2P,' the executive said. 'That's not easy, but it's solvable.'" Brooks Boliek, *Induce Act Stalls as Compromise Talks Break Down*, THE HOLLYWOOD REPORTER, Oct. 8, 2004, http://www.hollywoodreporter.com/thr article_display.jsp?vnu_content_id=1000661869.

39. In the Oct. 5 Draft, for example, "[t]he term 'covered peer-to-peer product' . . . . mean[t] a widely available device, or computer program for execution on a large number of devices, communicating over the Internet or any other publicly available network and performing or causing the performance at each such device all of the following functions," including "providing search information relating to copies of phonorecords available for transmission to other devices," locating other devices to respond to the search requests; and "transmitting a requested copy or phonorecord to another device that located the copy or phonorecord through such other device's performance of the [locating] function," "unless the provider of the device or computer program has the right and ability to control the copies or phonorecords that may be located by its use." *Id.* (g)(2)(B).

(iii) Limitations on frivolous lawsuits and extended discovery until a prima facie case is presented that the infringement and product are of the type covered. *See, e.g., id.* (g)(3).

(iv) "Limitations on Remedies," permitting "[n]o award of statutory damages . . . unless the copyright owner sustains the burden of proving, and the court finds, that such violation was committed willfully," *see, e.g., id.* (g)(4)(A), and directing courts, "[i]n granting injunctive relief . . . to the extent practicable, [to] limit the scope of the injunctive relief so as not to prevent or restrain noninfringing uses of the covered peer-to-peer product," *id.* (g)(4)(B).

(v) Preclusion of any possibility that courts could add a layer of secondary liability to the new violation. *See, e.g., id.* (g)(5) ("No court shall apply a doctrine of secondary liability to the cause of action created by this subsection.").

(vi) Preservation of limitations in existing doctrines of secondary liability. *See, e.g., id.* (g)(6) ("Nothing in this subsection shall enlarge or diminish liability for direct infringement or the doctrines of vicarious and contributory infringement, *including any defenses thereto or any limitations on rights or remedies for infringement.*" (emphasis added)). This provision would have protected the existing parameters of the *Sony* defense – something the content owners are now trying to undo through this lawsuit.

(vii) Broad protections for service providers for performing functions defined under Section 512 of the DMCA (for example, transmitting, caching, hosting, or linking). *See, e.g.*, Oct. 5 Draft (g)(7). Even "service providers that primarily host[] on [their] website[s], or advertise[], the sale or offering for sale of covered peer-to-peer products by third parties through [their] website[s]" were to be exempted if they complied with the conditions in Section 512(c)(1) of the DMCA. *See, e.g., id.* (g)(8).

While imperfect, the bills discussed in the negotiations came closer to targeting only those actors whose behavior the co-sponsors intended to prohibit than did the original bill or the Copyright Office draft. They also included some of the provisions that, with revisions, would be necessary to protect

other technologies both present and future, such as exempting Internet service providers, and preserving the *Sony* defenses. By contrast, none of the new "federal common law" rules proposed by petitioners or their amici contains these limiting attributes.

IV. The Expansive Secondary Liability Sought by Petitioners Is Inconsistent with Federal Law and Policy Regarding the Internet and Broadband Internet Access.

In the 1996 Telecommunications Act, Congress sought to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services."[40] Congress directed the regulatory agencies to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing . . . methods that remove barriers to infrastructure investment."[41]

Congress has also spoken directly to the issue of secondary liability and Internet service providers. In the DMCA, Congress expressly limited the applicability of copyright remedies to service providers based upon the functions that they perform, in storing, transmitting, or providing Internet links to all forms of content. The DMCA contains an express disclaimer of any intent to require ISPs to monitor (let alone police) any user-to-user communications, as well as recognition that technological protection measures for copyrights must be developed by consensus among the relevant industry parties in an open standards-setting process.

Congress cautioned that, "without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet."[42] Specifically, Congress was concerned that the

40. S. Conf. Rep. No. 104-230, at 1 (1996); H.R. Conf. Rep. No. 104-458, at 1 (1996).

41. Telecommunications Act of 1996, § 706, Pub. L. No. 104-104, 110 Stat. 153 (1996), *reprinted in* 47 U.S.C. § 157 note.

42. S. Rep. No. 105-190, at 8 (1998); *see id.* at 19-20 (describing need for "greater certainty to service providers concerning their legal exposure for infringement that may occur in the course of their activities").

possibility of courts imposing liability on the functions performed by most service providers, such as in the case of *Playboy Enterprises v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding bulletin board service strictly liable for material posted on its service without regard to knowledge), would chill investment in Internet access upgrades. S. Rep. No. 105-190, at 8, 19 & n.20 (1998).

To this end and after "3 months of negotiations supervised by [Senate Judiciary Committee staff and] Chairman Hatch and assisted by Senator Ashcroft among the major copyright owners and the major OSP[]s and ISP[]s," *id.* at 9, Congress expressly limited copyright remedies against those service providers who perform conduit, caching, storage, and information location functions, 17 U.S.C. § 512(a)-(d). Congress, however, went further than curbing such liability for service providers, announcing that nothing in the DMCA could be construed as imposing a duty on service providers to monitor their services for infringement. H.R. Rep. No. 105-551, Pt. 2, at 61 (1998) (nothing in the DMCA "suggest[s] that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing").

Service providers are obligated only to avoid interference with "standard technical measures" — measures that, among other things, "have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process" and "do not impose substantial costs on service providers or substantial burdens on their systems or networks." 17 U.S.C. § 512(i). The DMCA also forbids the imposition of affirmative duties on service providers to police their users' communications or to deploy technological measures that could weed out infringing from noninfringing communications. *Id.*; H.R. Rep. No. 105-551, at 61. In fact, a different law, the Electronic Communications Privacy Act, codified at 18 U.S.C. §§ 2701, *et seq.*, makes

unauthorized access to private electronic communications a federal felony.[43]

The DMCA squarely placed the burden on copyright owners to investigate infringement and invited all implicated industries to take part in reaching a "broad consensus" on the appropriate "technological solutions" that should be used, 17 U.S.C. § 512(i)(2)(A); H.R. REP. No. 105-551, at 61. Thus, the DMCA evinces a clear intent to limit copyright liability for service providers, and to insulate them from any general duty to police their services or unilaterally to install filters or other devices to sort out infringing content.[44]

The broad multi-factored tests for contributory and vicarious liability advocated by petitioners here are antithetical to the goals of the DMCA and would do precisely what Congress wished to preclude in that legislation.[45]

43. Various other statutes demonstrate the same national policy of protecting the Internet from crippling duties or monetary liability: a) Congress immunized providers of "interactive computer service[s]" from liability as a "publisher or speaker" of any content provided by another information content provider, 47 U.S.C. § 230(c)(1); b) in the child protection statute at issue in *Ashcroft v. ACLU*, __ U.S. __, 124 S. Ct. 2783 (2004), Congress exempted from all liability a whole host of passive carriers and Internet-related technologies and services, including telecommunications carriers, Internet access providers, and providers of Internet directories and hypertext links, 47 U.S.C. § 231(b); and c) last Fall, in amendments to a copyright-related statute, 18 U.S.C. § 2318, that broaden its prohibition against trafficking in falsified authentication features for copyrighted works, Congress jettisoned earlier versions of the legislation that would have imposed potential liability on service providers for electronic dissemination of authentication features, *see* H.R. REP. No. 108-600, at 6 (2002); *compare* Section 103(a)(2) of H.R. 3632, as enrolled, 108th Cong. 2d Sess. (2002), *with* S. 2395 as reported, 107th Cong. 2d Sess. (2004).

44. The DMCA reflects extraordinary solicitude to Internet users' privacy and makes clear that service providers need not engineer their systems to include measures to protect copyrights. Specifically, Congress "designed" Section 512(m) "to protect the privacy of Internet users," H.R. REP. No. 105-511, at 64, and "ma[d]e[] clear that the applicability of" the limitations on liability outlined in the DMCA "is in no way conditioned on a service provider," *id.*, "monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with [the 'standard technical measures']," 17 U.S.C. § 512(m)(1).

45. *See, e.g.*, MPRC Br. 32-33 (asking this Court to consider "separating (Cont'd)

Petitioners' new "federal common law" rules would require courts to circumvent the approach Congress mandated in the DMCA (and has adopted whenever it sought to amend Copyright Act) to craft multi-industry technological solutions, and would virtually guarantee that multi-use technology providers must violate the privacy rights of their subscribers in order to avoid liability. Congress never contemplated that courts could or would create such sweeping new rules of secondary liability and thereby undermine the careful balance struck by the DMCA.[46] Indeed, because Congress has spoken directly to the duties that may and may not be imposed on service providers in the name of copyright law, "the need for such an unusual exercise of [federal common] lawmaking by federal courts disappears." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 314 (1981).

(Cont'd)
mechanisms [that] are readily available" in determining liability); *id.* at 39-40 (same for "willful blindness" or the decision not to monitor the content of users' communications); *id.* at 40-41 (advocating that *the Court* create incentives for multi-use technology providers unilaterally to implement filtering mechanisms); *id.* at 44-46 (same).

46. Although Senate Committee Reports did suggest that "the Committee decided to leave current law in its evolving state and, instead, to create a series of 'safe harbors,' for certain common activities of service providers," S. REP. No. 105-190, at 19, there is no suggestion that eviscerating the defenses and principle of deference identified in *Sony* would be considered part of the "evolving state" or that the law could "evolve" in such a way as to permit courts to impose the very duties on service providers that Congress had foreclosed by statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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